STATE OF MICHIGAN

COURT OF APPEALS

JOSEPH LOZOWSKI,

Plaintiff-Appellant,

v

ELISE M. BENEDICT and WILLIAM GRAY,

Defendants-Appellees.

UNPUBLISHED
February 7, 2006

No. 257219
Oakland Circuit Court
LC No. 04-055419-CZ

Before: Davis, P.J., and Fitzgerald and Cooper, JJ.

PER CURIAM.

Plaintiffs and defendants formerly held all shares of a now-dissolved closely held corporation. Plaintiff brought this action against defendants, alleging claims for minority shareholder oppression, breach of fiduciary duty and breach of contract, and requesting monetary damages, an accounting and injunctive relief. Plaintiff appeals as of right from the circuit court's order granting defendants summary disposition pursuant to MCR 2.116(C)(5), (7) and (8). We affirm in part, reverse in part and remand.

The circuit court granted summary disposition in part under MCR 2.116(C)(5), on the basis of its determination that plaintiff's claims were derivative to those of the corporation and should have been brought as a shareholder derivative action, rather than by plaintiff in his individual capacity. Plaintiff insists that he lacked standing to file a shareholder derivative action because the corporation had dissolved before he filed suit.

Whether a party has standing to sue constitutes a legal question subject to de novo review. *Crawford v Dep't of Civil Service*, 466 Mich 250, 255; 645 NW2d 6 (2002). We also consider de novo the circuit court's summary disposition ruling. *Allen v Keating*, 205 Mich App 560, 562; 517 NW2d 830 (1994). "In reviewing a grant of a motion for summary disposition pursuant to MCR 2.116(C)(5), we must consider the pleadings, depositions, admissions, affidavits, and other documentary evidence submitted by the parties." *Rohde v Ann Arbor Pub Schools*, 265 Mich App 702, 705; 698 NW2d 402 (2005).

According to MCL 450.1492a, to commence or maintain a shareholder derivative action, a shareholder must have been a shareholder "at the time of the act or omission complained of," subsection 492a(a), and must remain a shareholder "until the time of judgment." Subsection 492a(c). Although plaintiff maintains that he could not have brought this suit as a shareholder derivative action because the corporation had dissolved in April 2003, MCL 450.1834

contemplates that "a dissolved corporation, its officers, directors and shareholders shall continue to function in the same manner as if dissolution had not occurred." Subsection 834(e) also allows a dissolved corporation to "sue and be sued in its corporate name . . . in the same manner as if dissolution had not occurred."

We strive to read these potentially conflicting provisions harmoniously and, if unambiguous, apply the statutes as written.[1] *Nowell v Titan Ins Co*, 466 Mich 478, 482; 648 NW2d 157 (2002). Having carefully considered the clear and unambiguous language of § 492a and § 834, we find that they do not conflict. While § 492a governs shareholder derivative suits in general, § 834 provides specific and complementary rules applicable to dissolved corporations. Specifically, while § 492a imposes the requirement that a plaintiff in a shareholder derivative action be a shareholder at the time of the action's filing and judgment, § 834 explicitly contemplates that a shareholder of a dissolved corporation should continue to function with respect to the corporation as if no dissolution had taken place. Together, § 492a and § 834 anticipate that a shareholder in a dissolved corporation has standing to pursue a derivative action on the corporation's behalf "as if dissolution had not occurred." Adopting plaintiff's interpretation would vitiate parts of § 834 and effectively preclude a shareholder derivative suit from ever being maintained on behalf of a dissolved corporation. We conclude that the circuit court correctly rejected plaintiff's argument that he lacked standing to bring a shareholder derivative action on behalf of the dissolved corporation.[2]

Plaintiff next argues, with respect to the circuit court's invocation of MCR 2.116(C)(8), that the court erred by finding that he stated claims derivative to claims of the corporation, rather than claims alleging an individualized injury. A motion under subrule (C)(8) tests the legal sufficiency of a claim by the pleadings alone. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). "All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Id*. at 119. The motion "may be granted only where the claims alleged are 'so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.'" *Id*., quoting *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992).

"The doctrine of standing provides that a suit to enforce corporate rights or to redress or prevent injury to a corporation, whether arising from contract or tort, ordinarily must be brought in the name of the corporation, and not that of a stockholder, officer, or employee." *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 474; 666 NW2d 271 (2003). Two related exceptions exist, under which circumstances a stockholder or employee may bring suit on his own behalf.

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[1] This Court considers de novo questions of statutory interpretation. *Diamond v Witherspoon*, 265 Mich App 673, 682; 696 NW2d 770 (2005). When construing statutes, we consider the specific statutory language at issue and, if the language is clear and unambiguous, we must apply it as written, and may not engage in judicial construction. *Id*. at 684.

[2] Because plaintiff concedes that he did not file a shareholder derivative action, we need not address whether a derivative action ever may be pursued without making the required demand on the corporation's board of directors. See MCL 450.1493a(a); MCR 3.502(A).

"'A stockholder may individually sue corporate directors, officers, or other persons when he has sustained a loss separate and distinct from that of other stockholders generally.'" *Christner v Anderson, Nietzke & Co, PC*, 433 Mich 1, 9; 444 NW2d 779 (1989), quoting 19 Am Jur 2d, Corporations, § 2245, p 147.[3] An officer or stockholder also may file suit individually if he "can show a violation of a duty owed directly to [him] that is independent of the corporation." *Belle Isle Grill Corp, supra*, citing *Michigan Nat'l Bank v Mudgett*, 178 Mich App 677, 679; 444 NW2d 534 (1989). The second exception allowing a shareholder to sue individually "does not arise, however, merely because the acts complained of resulted in damage both to the corporation and to the individual, but is limited to cases where the wrong done amounts to a breach of duty owed to the individual personally." *Michigan Nat'l Bank, supra* at 679-680. "Thus, where the alleged injury to the individual results only from the injury to the corporation, the injury is merely derivative and the individual does not have a right of action against the third party." *Id.* at 680.

In this case, plaintiff alleged in his breach of fiduciary duty and breach of contract counts that defendants funneled corporate funds to other corporations in which they held interests, which conduct breached (1) their fiduciary duties to the corporation, and (2) their contractual duties to conduct corporate business "in a financially sound manner," and to conduct corporate business activities fairly and equitably for the benefit of all shareholders.[4] Plaintiff maintains that because he and defendants were the only three shareholders and defendants stood to benefit from their own alleged misconduct, he suffered an injury that the remaining shareholders did not.

But regardless of whether plaintiff suffered an injury, each of the complaint's allegations refers to breaches and injuries to the *corporation* or *all shareholders*. In the complaint, plaintiff simply offers no basis for his alleged injuries independent of the alleged harm to the corporate entity; the complaint asserts neither that defendants owed him a personal duty independent of what they owed to the corporation as shareholders, nor that he suffered some individualized injury distinct from the harm that defendants allegedly inflicted on the corporation. Because the exceptions allowing individual shareholders to sue individually do not apply when the acts complained of result in damage both to the corporation and to the individual, *Michigan Nat'l Bank, supra* at 679-680, we conclude that the circuit court correctly found that plaintiff's breach of contract and breach of fiduciary duty claims failed to state an actionable individual injury.

Lastly, plaintiff argues that the circuit court erred in dismissing his minority shareholder oppression claim under MCR 2.116(C)(7) (res judicata) and (C)(8). Whether the doctrine of res judicata applies involves a legal question that we review de novo. *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 379; 596 NW2d 153 (1999). When reviewing a motion under subrule (C)(7), this Court accepts all well pleaded complaint allegations as true, unless

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[3] In *Christner, supra*, the Supreme Court agreed that because the plaintiff was the only one of ten shareholders who did not receive a distribution of corporate assets upon liquidation, he suffered an individual injury that entitled him to sue on his own behalf.

[4] According to the complaint, by the same alleged misconduct, defendants violated their duty to abide by an implied covenant of good faith and fair dealing.

contradicted by documentary evidence that establishes a genuine issue of material fact. MCR 2.116(G)(5); *Maiden, supra* at 119; *Guerra v Garratt*, 222 Mich App 285, 289; 564 NW2d 121 (1997). If no facts are in dispute, or if reasonable minds could not differ regarding the legal effect of those facts, then whether the plaintiff's claim is barred constitutes a question for the court as a matter of law. *Maiden, supra* at 122; *Guerra, supra*.

Plaintiff's shareholder oppression claim derives from MCL 450.1489(1), which allows a shareholder to bring an action "to establish that the acts of the directors or those in control of the corporation are illegal, fraudulent, or willfully unfair and oppressive to the corporation or to the shareholder." Subsection 489(3) defines "willfully unfair and oppressive conduct" as "a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the shareholder as a shareholder."

Contrary to defendants' argument, the plain statutory language does not require that the plaintiff be a minority shareholder, or show that each defendant individually is a majority shareholder. Rather, subsection 489(1) requires only a showing that the defendants are "in control of the corporation." Here, plaintiff sufficiently alleged under subsection 489(1) that defendants collectively owned 60 percent of the corporation's shares and comprised two-thirds of the board of directors, and thus had control over corporate affairs.

Plaintiff further alleged that defendants misused their collective power over corporate affairs to enrich themselves at the expense of the corporation and plaintiff, the minority shareholder, by funneling corporate funds to two other corporations that defendants controlled. Viewing these allegations as true and construing them in plaintiff's favor, we find that plaintiff sufficiently alleged that defendants took "a significant action or series of actions that substantially interfere[d] with the interests of the shareholder as a shareholder." MCL 450.1489(3). Consequently, we conclude that the circuit court erred to the extent that it granted summary disposition of plaintiff's minority shareholder oppression claim under MCR 2.116(C)(8).[5]

Defendants correctly argue that res judicata bars a subsequent action between the same parties when the facts or evidence essential to the action are identical to those essential to a prior action.[6] *Ozark v Kais*, 184 Mich App 302, 307; 457 NW2d 145 (1990). The doctrine requires a

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[5] Contrary to their representations on appeal, defendants did not move for summary disposition under MCR 2.116(C)(10) (no genuine issue of material fact). Additionally, the circuit court clearly granted summary disposition to defendants solely under MCR 2.116(C)(5), (7) and (8). Thus, while plaintiff may not have countered defendants' allegation that the transactions at issue were duly approved, he had no burden to do so given the grounds alleged in defendants' motion. See *Maiden, supra* at 119 (unlike a motion under (C)(10), a party requesting summary disposition under MCR 2.116(C)(7) need not file supportive material and the opposing party need not reply with supportive material).

[6] Although the circuit court addressed the propriety of summary disposition on res judicata grounds, defendants correctly observe that on appeal, plaintiff fails to argue that res judicata does not preclude its shareholder oppression claim. "Ordinarily, we do not address issues not raised

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showing that: (1) the prior action was decided on the merits in a final decision, (2) the issue disputed in the second case was or could have been resolved in the prior action, and (3) both actions involve the same parties or their privies. *Kosiel v Arrow Liquors Corp*, 446 Mich 374, 379; 521 NW2d 531 (1994); *Ozark*, *supra* at 307-308.

"In most instances, the denial of a motion to amend will not be a decision on the merits." *Martin v Michigan Consolidated Gas Co*, 114 Mich App 380, 383; 319 NW2d 352 (1982). "However, when . . . the denial is made on the basis of the futility of the amendment, it is in effect a determination that the added claims are substantively without merit." *Id*. at 384. "Such a determination is entitled to res judicata impact." *Id*.

Plaintiff previously filed a 2002 shareholder derivative action that the circuit court dismissed without prejudice. The parties do not dispute that the circuit court also denied plaintiff's motion to amend his 2002 complaint to add a shareholder oppression claim. The instant record, however, contains no indication that the denial of plaintiff's motion to amend amounted to a decision on the merits, i.e., that the circuit court previously found that plaintiff's proposed amendment qualified as futile. *Martin*, *supra*. The order denying plaintiff's motion to amend that defendants submitted in this case states only that "Plaintiff's Motion to Amend is DENIED" "[f]or the reasons stated on the record." The transcript of the motion hearing in the prior action does not appear as part of the record in this case. Thus, defendants have failed to show that the circuit court previously dismissed plaintiff's motion to amend on the merits. Accordingly, we conclude that the circuit court in this case erred by dismissing plaintiff's shareholder oppression claim on the basis of res judicata.

Affirmed in part, reversed in part and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Alton T. Davis
/s/ E. Thomas Fitzgerald
/s/ Jessica R. Cooper

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below or on appeal, or issues that were not decided by the trial court. However, this Court possesses the discretion to review a legal issue not raised by the parties." *Tingley v Kortz*, 262 Mich App 583, 588; 688 NW2d 291 (2004). "To the extent this issue was not properly raised on appeal, we have held that we may choose to 'address any issue that, in the court's opinion, justice requires be considered and resolved.'" *LME v ARS*, 261 Mich App 273, 287; 680 NW2d 902 (2004), quoting *Paschke v Retool Industries (On Rehearing)*, 198 Mich App 702, 705; 499 NW2d 453 (1993), rev'd on other grounds 445 Mich 502; 519 NW2d 441 (1994). Because, as discussed *infra*, the record does not support the circuit court's reliance on res judicata, we find that justice requires our consideration and resolution of the res judicata question.